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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/823,795	04/14/2004	Daniel R. Feldmeier	1410/77107	4678
48940 7590 04/07/2009 FITCH EVEN TABIN & FLANNERY 120 SOUTH LASALLE STREET SUITE 1600 CHICAGO, IL 60603-3406				
EXAMINER				
BECKER, DREW E				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
04/07/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/823,795

Applicant(s)

FELDMEIER ET AL.

Examiner

Drew E. Becker

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 December 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-11, 13-22 and 26-28 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-11, 13-22 and 26-28 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SF/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Response to Amendment

1. It should be noted that a new examiner has been assigned to this application.

The previous rejections could not be sustained and therefore a new rejection has been made, as described below. Any inconvenience is sincerely regretted.

Double Patenting

2. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

3. Claims 1-11, 13-22, and 26-28 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-22, particularly claim 7-22, of copending Application No. 11/618,270 in view of Field [Pat. No. 3,559,865]. The '270 application does not recite the inclined portions having a

max width less than the central portion. Field teaches a reclosable bacon package and method comprising a rigid tray with a base, sidewalls, endwalls, flange, and ledge (Figures 3-4, #10, 24, 12a-b, 16a-b,18), the base having a flat central portion and inclined portions on either side (Figures 3-4, #18 & 22a-b), the inclined portions defining a total width which is about 50-80% of the width of the flat central portion (Figures 3-4), the central base portion having side areas which are approximately level and jut toward the sidewalls between the inclined portions and endwalls (Figure 3, #18), a shingled stack of sliced bacon in the tray (Figures 1-2; column 2, lines 62-70), a rigid cover panel with an integrated flange (Figures 3-4, #26), the inclined base portions having an angle of between 20-40° (Figure 4, #22a-b), the inclination of one inclined portion varying from the other by 3-10° (Figure 4), sealing the package along the flanges (column 3, line 6), molding the package (column 3, line 16), and the inclined portions comprising plural upraised ribs (Figures 3-4, #22a-b). It would have been obvious to one of ordinary skill in the art to incorporate the intermittent inclined portions of Field into the package of '270 since both are directed to bacon packages, since '270 already included inclined portions (claim 7), and since the inclined portions of Field provided a containment area for excess juices between the inclined portions and the endwalls while also providing "feet" at the periphery of the package to prevent tipping.

This is a provisional obviousness-type double patenting rejection.

Claim Rejections - 35 USC § 112

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claims 26-28 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

6. Claims 26-28 recite portions of "the central base portion are approximately level with the central base portion". It is not clear how the central base portion could NOT be "approximately level" with itself. It is not clear what degree of difference would be considered "approximately level". It is not clear what is being claimed.

Claim Rejections - 35 USC § 103

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. Claims 1-11, 13, 19-22, and 26-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Field [Pat. No. 3,559,865] in view of Castellanos et al [US 2004/0062838A1].

Field teaches a reclosable bacon package and method comprising a rigid tray with a base, sidewalls, endwalls, flange, and ledge (Figures 3-4, #10, 24, 12a-b, 16a-b, 18), the base having a flat central portion and inclined portions on either side (Figures 3-4, #18 & 22a-b), the inclined portions defining a total width which is about 50-80% of the width of the flat central portion (Figures 3-4), the central base portion having side areas which

are approximately level and jut toward the sidewalls between the inclined portions and endwalls (Figure 3, #18), a shingled stack of sliced bacon in the tray (Figures 1-2; column 2, lines 62-70), a rigid cover panel with an integrated flange (Figures 3-4, #26), the inclined base portions having an angle of between 20-40° (Figure 4, #22a-b), the inclination of one inclined portion varying from the other by 3-10° (Figure 4), sealing the package along the flanges (column 3, line 6), molding the package (column 3, line 16), and the inclined portions comprising plural upraised ribs (Figures 3-4, #22a-b). Field does not recite the inclined portions being continuous, the cover having an inset between the panel and flange, the cover inset slidably engaging the tray ledge projection/indentations in the form of cover inset ribs which engage grooves in the tray ledge along the walls and corners, one of the cover and tray being transparent, the package being transparent enough to permit visual inspection of at least 70% of the bacon slices, the tray being transparent, the tray being opaque, the tray and cover both being transparent, the use of heat seals, and thermoforming of the package. Although not specifically illustrated, it would have been obvious to one of ordinary skill in the art to join the plural ribs of Figure 3-4 of Field into a single continuous rib since Field teaches that the rib spacing and width is based on the prevention of undue sagging of the bacon slices (column 2, lines 48-51), since a continuous rib would have eliminated the need for the three interior spaces in Figure 3 and thus required less material and reduced cost, since many consumers preferred thin sliced bacon which would have a greater degree of sagging, and since the retention of the two exterior spaces at the end of each row would have still provide feet which stabilized the package. Furthermore, the claims

would have been obvious because the substitution of one known element (ie a continuous inclined portion) for another (ie spaced inclined portions) would have yielded predictable results to one of ordinary skill in the art at the time of the invention.

Castellanos et al teach a package and method for sliced meats comprising a rigid cover and tray (Figure 1, #12 &18), the cover having an inset portion with plural ribs along the sides and corners (Figure 2, #50), the tray having a ledge with plural grooves to slidably engage the cover ribs (Figure 2, #52), forming both the cover and tray from clear or at least partially transparent materials (paragraph 0047), not forming the tray or base from clear material (paragraph 0050), heat sealing the cover to the tray (paragraph 0085), and thermoforming the cover and tray (paragraph 0047). It would have been obvious to one of ordinary skill in the art to incorporate the cover and tray features of Castellanos et al into the invention of Field since both are directed to rigid food containers, since Field already disclosed a rigid cover and tray which were capable of being reclosed by simply lowering the cover onto the tray after it had been opened (Figures 3-4) as well as sealing and molding the package (column 3, lines 6 & 16) and the presence of a ledge between the inclined portions package mouth (Figure 3-4), since Field simply did not describe whether the package material was transparent or tinted, since the use of transparent material for the package of Field would have resulted in at practically all of the bacon slices being easily viewed by the consumer, since many consumers would have preferred this maximum viewability in order to further ensure the purchase of high quality bacon without any defects, since the ribs and grooves of Castellanos et al would have provided a more secure closure and improved reclosability of the package and

thus provided a longer shelf life for any unused portions of the bacon of Field, and since the heat sealing and thermoforming of Castellanos et al were conventional and commonly used methods in the package art. In conclusion, all of the claimed elements were known in the prior art and one skilled in the art could have combined the element by known methods with no change in their respective functions, and the combination would have yielded predictable results to one of ordinary skill in the art the time of the invention.

9. Claims 14-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Field, in view of Castellanos et al, as applied above, and further in view of Mahaffy et al [Pat. No. 3,792,181].

Field and Castellanos et al teach the above mentioned concepts. Field and Castellanos et al do not recite the package material being a multi-layer film laminate with an intermediate layer which oxygen impervious, a structural outer layer which is rigid, and a sealant layer for heat sealing. Mahaffy et al teach a bacon package and method comprising a thermoformable material comprising an intermediate layer which oxygen impervious, a structural outer layer which is rigid, and a sealant layer for heat sealing (column 3, lines 45-71; Figure 3). It would have been obvious to one of ordinary skill in the art to incorporate the multi-layer film of Mahaffy et al into the invention of Field, in view of Castellanos et al, since all are directed to rigid meat packages, since Field simply did not what particular types of materials were to be used, and since Mahaffy et al teach that a multi-layer film was capable of combining the desired features and

capabilities of several different materials to provide a more durable, oxygen resistant, and easily heat sealed package.

10. Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Field, in view of Castellanos et al and Mahaffy et al, as applied above, and further in view of Rivett et al [Pat. No. 6,6330,237].

Field, Castellanos et al, and Mahaffy et al teach the above mentioned concepts. Mahaffy et al also teaches easy peelability (column 3, line 70). Field, Castellanos et al, and Mahaffy et al do not recite the sealant layer having a multi-film structure. Rivett et al teach a meat package and method comprising a sealant layer having a multi-film structure (Figure 5, #16, 20, 22-23; column 7, lines 19-65). It would have been obvious to one of ordinary skill in the art to incorporate the multi-film sealant layer of Rivett et al into the invention of Field, in view of Castellanos et al and Mahaffy et al, since all are directed to rigid meat packages, since Field simply did not what particular types of materials were to be used, since Mahaffy et al already taught a multi-layer film which was capable of combining the desired features and capabilities of several different materials to provide a more durable, oxygen resistant, and easily heat sealed package, and since the multi-film sealant layer of Rivett et al would have further ensured that the cover would be easily removed from the tray without any damage to either the tray or the cover during repeated opening and closing.

Response to Arguments

11. Applicant's arguments filed 12/18/08 have been fully considered but they are not persuasive.

Applicant argues that Field does not teach continuous inclined portions with flat base portions between the inclined portions and endwalls. However, Field clearly teaches the inclined portions defining a total width which is about 50-80% of the width of the flat central portion (Figures 3-4), and the central base portion having side areas which are approximately level and jut toward the sidewalls between the inclined portions and endwalls (Figure 3, #18). Although not specifically illustrated, it would have been obvious to one of ordinary skill in the art to join the plural ribs of Figure 3-4 of Field into a single continuous rib since Field teaches that the rib spacing and width is based on the prevention of undue sagging of the bacon slices (column 2, lines 48-51), since a continuous rib would have eliminated the need for the three interior spaces in Figure 3 and thus required less material and reduced cost, since many consumers preferred thin sliced bacon which would have a greater degree of sagging, and since the retention of the two exterior spaces at the end of each row would have still provide feet which stabilized the package. Furthermore, the claims would have been obvious because the substitution of one known element (ie a continuous inclined portion) for another (ie spaced inclined portions) would have yielded predictable results to one of ordinary skill in the art at the time of the invention.

In addition, applicant's cancelled claims 23-25 were directed to the inclined portions comprising a "plurality of intermittently upraised portions". Clearly, changing the shape of the inclined portions would have yielded predictable results.

Conclusion

12. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Drew E. Becker whose telephone number is 571-272-1396. The examiner can normally be reached on Mon.-Fri. 9am to 5:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rena Dye can be reached on 571-272-3186. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Drew E Becker/
Primary Examiner, Art Unit 1794